APPENDIX

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

Civil Action File No. D-90676

SMS HASENCLEVER, GMBH,
Plaintiff,

-v-

BANCA NAZIONALE DEL LAVORO,
Defendant.

AFFIDAVIT OF PATRICK M. NORTON

Personally appeared before, the undersigned officer duly authorized by law to administer oaths, PATRICK M. NORTON, who being duly sworn, states as follows:

1. My name is PATRICK M. NORTON. I am over 18 years of age and suffer from no legal disability. I have personal knowledge of the facts stated herein and if called as a witness, can competently testify thereto.

2. My law firm is counsel to SMS Hasenclever, GmbH ("SMS"), Plaintiff in the above-captioned lawsuit.

3. By letter dated December 17, 1990, I wrote to the Atlanta office of Defendant Banca Nazionale del Lavoro ("BNL") on behalf of SMS demanding that BNL acknowledge its obligations pursuant to BNL Letters of Credit ("L/C") Nos. 11751 and 11752 to honor certain documentary presentations of SMS. A true and correct copy of the letter of December 17, 1990 is attached to Plaintiff's First Amended Complaint as Exhibit 11.

4. Counsel to BNL responded to my letter of December 17, 1990 by a letter dated February 26, 1991. A true

and correct copy of BNL's letter of February 26, 1991 is attached to Plaintiff's First Amended Complaint as Exhibit 12.

5. By letter dated April 5, 1991, I transmitted, on behalf of SMS, a copy of Treasury Department License No. IQ-0048 to counsel for BNL. A true and correct copy of the letter of April 5, 1991 is attached to Plaintiff's First Amended Complaint as Exhibit 14.

6. By letter dated May 6, 1991, I transmitted, on behalf of SMS, a copy of amended Treasury Department License No. IQ-0048(a) to BNL. A true and correct copy of the letter of May 6, 1991 is attached to Plaintiff's First Amended Complaint as Exhibit 17.

7. By letter dated November 15, 1991, I wrote counsel for BNL proposing, *inter alia,* that SMS submit to BNL new invoices for SMS's shipments to Iraq of June 20, 1990 omitting the negative origin statements that appeared in the original invoices. A true and correct copy of the letter of November 15, 1991 is attached hereto as Exhibit A.

8. By letter dated November 18, 1991, counsel for BNL refused to accept new invoices for SMS's shipments of June 20, 1990 on the ground that they would be untimely. A true and correct copy of BNL's letter of November 18, 1991 is attached hereto as Exhibit B.

9. By letter dated May 9, 1991, I wrote on behalf of SMS to William Skidmore, Director of the Office of Antiboycott Compliance ("OAC") at the United States Commerce Department. That letter requested that OAC confirm that the U.S. Antiboycott Regulations, 15 C.F.R. Part 769, do not apply to the implementation of BNL L/C No. 11751 and 11752 in accordance with the terms of Section 769.2(f)(6) and requested an opportunity to discuss the matter with Mr. Skidmore. A true and correct copy of my letter of May 9, 1991 is attached as Exhibit C hereto.

10. A staff member of OAC replied to my letter of May 9, 1991 by telephone. No written reply was ever received. In the telephone conversation is was agreed that a meeting would be held at OAC's offices to discuss the subject matter of my letter of May 9, 1991.

11. On May 14, 1991, Dr. Ulrich Trost, inhouse counsel for SMS, AG, the parent of SMS, and I met with Ms. Mary Martin of the OAC staff in Ms. Martin's offices at the Commerce Department in Washington, D.C. Ms. Martin acknowledged that the prohibitions of Section 769.2(f) of the Antiboycott Regulations did not apply to implementation of BNL L/C Nos. 11752. She said, however, that OAC interpreted Section 769.2(d) of the Antiboycott Regulations as including prohibitions separate and apart from the prohibitions of Section 769.2(f) and not subject to the exemptions of Section 769.2(f)(6). Despite repeated requests from Dr. Trost and myself, Ms. Martin offered no explanation of how this interpretation could be reconciled with the plain language of the Regulations and the legislative history of the statutory authority for those Regulations. She was also unable to identify anyone at the U.S. Commerce Department who was willing or able to make this explanation.

12. In early November 1991, I telephoned Ms. Martin to request a meeting with Mr. Skidmore to discuss OAC's "interpretation" of Sections 769.2(d) and (f) of the Antiboycott Regulations. Ms. Martin telephoned me back shortly thereafter and advised me that Mr. Skidmore saw no purpose to be served by such a meeting.

13. By letter dated November 15, 1991, I wrote Mr. Skidmore again, articulating once more why SMS believed that OAC's reported "interpretation" of Sections 769.2(d) and (f) of the Antiboycott Regulations could not be reconciled with the text of the Regulations or the legislative history of their statutory authority and, again, requesting a meeting with Mr. Skidmore at his convenience. A true and correct copy of the letter of November 15,

1991 is attached hereto as Exhibit D. No written reply to my letter was ever received.

14. On December 4, 1991, Mr. William Arvin, Director of the Policy Division of OAC, telephoned me in response to my letter of November 15. I explained SMS's position again to Mr. Arvin at length. Mr. Arvin promised to discuss the issue with Mr. Skidmore and contact me again promptly. On December 10, 1991, not having heard from Mr. Arvin, I telephoned him again. Mr. Arvin advised me that he had not spoken yet to Mr. Skidmore about this matter and promised to do so and call me back the same day.

15. During the week of December 16, 1991, still not having heard from Mr. Arvin, I telephoned him once more. Mr. Arvin said that Mr. Skidmore still saw no purpose to be served by a meeting. Once again, I requested that OAC at least explain how its interpretation of the Regulations could be reconciled with the text of the Regulations and the statute's legislative history. Mr. Arvin was unable or unwilling to do so.

16. By letter dated January 14, 1992, I wrote Mr. Skidmore a final time explaining SMS's position. I noted that I had repeatedly requested OAC, both orally and in writing, to explain its interpretation of the Regulations, and that OAC had not even offered an explanation. I said that, in the absence of such an explanation, SMS was compelled to conclude that OAC's interpretation could not be reconciled with the terms of the Antiboycott Regulations or with the statutory authority underlying those Regulations. A true and correct copy of the letter of January 14, 1992 is attached hereto as Exhibit E. OAC has never replied to my letter of January 14, 1992.

17. Attached hereto as Exhibits F and G respectively, are true and correct copies of the exchange rate quotations from the *Wall Street Journal* for July 13, 1990 and November 16, 1990, the dates on which B&L [*sic*] dishonored SMS's presentations under L/C 11751, one of the

two letters of credit at issue in this case. These quotations are well-known, reliable and accurately reflect the international exchange rates on the dates referenced therein.

18. Attached hereto as Exhibit H is a true and correct copy of worksheets reflecting the calculation of prejudgment interest due and owing on L/C 11751 and L/C 11752 from the July 11, 1990 and the November 13, 1990 dates of presentment. These calculations reflect the total prejudgment interest due and owing on the amounts claimed in Counts I-IV of the First Amended Complaint as of October 1, 1992 and the daily rate of interest that will continue to accrue on each of these claims until the date of judgment.

I have read the above affidavit consisting of 5 pages and swear that the facts set forth herein are true and correct.

/s/ Patrick M. Norton
PATRICK M. NORTON

(Notary Omitted in Printing)

EXHIBIT C

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May 9, 1991

Mr. William Skidmore
Director
Office of Anti-Boycott Compliance
Bureau of Export Administration
United States Department of Commerce
Washington, D.C.

Attn: Ms. Mary Martin

Dear Mr. Skidmore:

On behalf of my client SMS Hasenclever GmbH ("SMS"), I would like to request the opportunity to discuss with you the applicability of the Department's Anti-Boycott Regulations, 15 C.F.R. Part 769, to certain demands for payment by SMS under letters of credit issued by the Atlanta, Georgia branch of the Banca Nazionale del Lavoro ("BNL").

Background

SMS is a German corporation with no office or other presence in the United States. Pursuant to a July 1988 contract, SMS agreed to sell certain machinery to an Iraqi corporation. The machinery in question was manufactured in Germany, exported from the port of Hamburg, shipped to Aqaba, Jordan, and then transported overland by truck to Iraq. It never entered United States commerce in any respect.

Under the July 1988 contract, SMS was paid 20% in advance and the balance in stages. The subsequent payments were to be secured by two letters of credit, one denominated in U.S. Dollars and one in Deutschmarks, confirmed by a United States bank. The Iraqi party caused these letters of credit to be issued by the Central Bank of Iraq and confirmed by BNL, Atlanta in BNL's L/C Nos. 11751 and 11752, copies of which are attached.

Under paragraph A of each of the letters of credit, SMS is entitled to up to 60% of the value of a shipment of machinery payable aganist the presentation of specified documents. These documents include a signed commercial invoice, the original of which "must be attested by Iraqi Consulate Chamber of Commerce [sic]." A note on page 3 of each letter of credit provides that the "attestation [must be] by the Iraqi Commercial Attache or his representative in the Iraqi Diplomatic or Consular representation [sic] in the country of origin."

SMS made six shipments of machinery to Iraq under the July 1988 contract. In each instance, the Iraqi consulate in Hamburg required, as a condition to its attestation of SMS's commercial invoice, that the invoice be stamped with a certification that the goods were not of Israeli origin (a "negative certification").

In May 1990, BNL honored SMS's documents for the first two shipments, including invoices with negative certifications. In June 1990, SMS made two additional shipments. BNL dishonored SMS's demands for payment with respect to these shipments on the ground that inclusion of the negative certifications in SMS's invoices prohibited payment under the Anti-Boycott Regulations. SMS and its correspondent bank, Dresdner Bank, immediately objected to this dishonor. While this disagreement was pending, SMS made two more shipments of machinery to Iraq and two corresponding documentary presentations to BNL, each of which included an original invoice with a negative certification.

Four SMS demands for payment under BNL L/C Nos. 11751 and 11752 were thus pending when Iraq invaded Kuwait and, in response, President Bush issued Executive Order 12722 of August 2, 1990 freezing Iraqi assets. The Treasury Department's Office of Foreign Assets Control ("OFAC") construed this freeze to preclude payment under any letter of credit for which Iraq or an Iraqi party was an account party. OFAC indicated in a General License, however, that it was prepared to license on an individual basis payment for exports to Iraq that had occurred prior to August 2, 1990. 31 C.F.R. § 575.510. SMS applied for and was granted such a license. A copy of OFAC License No. IQ-0048 of April 5, 1991 is attached.

On April 8, 1991, SMS re-presented to BNL, via Dresdner Bank, all of its documents required for payment for the four shipments that had been made in the summer of 1990. BNL dishonored those presentations on April 18, 1991, arguing again that payment was prohibited by the Anti-Boycott Regulations.

Applicability of the Anti-Boycott Regulations

We believe that SMS's pending demands for payment under BNL's L/C Nos. 11751 and 11752 present two basic questions under the Anti-Boycott Regulations.

1. Is BNL prohibited from paying SMS's demands under Section 769.2(f)?

2. Is BNL prohibited by Section 769.2(d) from forwarding SMS's commercial invoices to the Iraqi issuing bank?

1. *The prohibition against paying SMS's demands is inapplicable.*

Section 769.1(d)(20) of the Anti-Boycott Regulations specifies that reference should be made to Section 769.2(f) "to determine the circumstances in which paying, honoring, confirming, or otherwise implementing a letter of credit is covered by this part." Section 769.2

(f)(1) provides that "no United States person may pay, honor, confirm, or otherwise implement a letter of credit which contains a condition or requirement compliance with which is prohibited by this part . . . ." The reference to "this part" in both sections refers to Part 769 and indicates that the provisions of Section 769.2(f) are intended to be a comprehensive statement of the conditions under which payment or honoring a letter of credit is prohibited by the Anti-Boycott Regulations.

Section 769.2(f)(6) then provides that the prohibitions of Section (f) apply "only when the transaction to which the letter of credit applies is in United States commerce and the beneficiary is a United States person." The prohibitions of Section (f), and hence the prohibitions of all of Part 769, do not, accordingly, apply to SMS's demands under BNL's letters of credit since: (1) the "transaction to which the letter of credit" applies was never in United States commerce in any respect; and (2) the "beneficiary," SMS, is not a "United States person."

2. *The prohibition against furnishing information about business relationships with boycotted countries is inapplicable to BNL's implementation of SMS's letter of credit.*

It has been suggested that, whether or not BNL is prohibited by Section (f) from paying SMS's demands, BNL may be prohibited by Section (d) from forwarding SMS's invoices with the negative certifications to the issuing Iraqi bank. We believe this suggestion is inaccurate for several reasons.

First, as noted above, Section 769.1(d)(20) and Section 769.2(f)(1) indicate that the prohibitions of Section (f) constitute a comprehensive statement of all of the anti-boycott prohibitions applicable to letters of credit under "this part," i.e., *all* of Part 769. It would be inconsistent with these provisions to construe Section (d) as an additional impediment to payment of a letter of credit demand.

This conclusion is confirmed by the definition of "implementing" in Section (f)(2) of the Regulations. Section (f)(1) states that "no United States person may pay, honor, confirm *or otherwise implement* a letter of credit" with the prohibited conditions (emphasis added). "Implementing" is defined in paragraph (2) to comprise a broad range of actions, including "taking any other action to implement a letter of credit." "Implementing" is thus defined so as to subsume *all* activities normally attendant upon payment of a demand under a letter of credit, including, we believe, a confirming bank's transmittal of documents to an issuing bank. The exemption of Section (f)(6) should therefore extend to the transmittal of those documents.

Secondly, the prohibition against furnishing information about business relationships with boycotted countries in Section (d) should not apply to SMS's transmittal of a payment document because BNL lacks the requisite intent to further the boycott. Paragraph (d)(5) provides that the prohibition of Section (d), like all other prohibitions in Part 769, applies "only when such activities are undertaken with intent to comply with, further, or support an unsanctioned foreign boycott." Although in presenting the negative certifications SMS was acting in response to an Iraqi request, BNL was not. Under these circumstances, we do not believe that an intention to comply with the boycott may be imputed to BNL.

Under applicable letter of credit law, moreover, a confirming bank has no responsibility for the content of the documents presented under the letter of credit. Thus, Article 17 of the Uniform Customs and Practice for Documentary Credits, applicable to L/C Nos. 11751 and 11752 pursuant to page 5 of each, provides that "*banks assume no liability or responsibility for the* form, sufficiency, accuracy, genuineness, falsification or *legal effect of any documents, or for the general and/or particular conditions stipulated in the documents or superimposed thereon*" (emphasis added). It would be contrary to this fundamental tenet of letter of credit law to impute to

BNL an intent to further the boycott simply by virue of transmitting SMS's documents to the Iraqi issuing bank.

More generally, Sections (d) and (f) of the Anti-Boycott Regulations evidence a policy of avoiding application of otherwise applicable prohibitions to transactions and parties outside U.S. jurisdiction. The prohibitions of those Sections—and, indeed, all the prohibitions in the Regulations—apply only to "United States persons." The letter of credit prohibitions in Section (f) go further and specifically exclude extraterritorial transactions and beneficiaries. It would be inconsistent with this basic policy to construe the Regulations to apply in any respect to payment of a letter of credit demand where: (1) the underlying transaction is wholly outside United States commerce; (2) the beneficiary is not a "United States person"; (3) the beneficiary prepared and executed documents wholly within a foreign jurisdiction and in accordance with the law of that jurisdiction; (4) the Regulations would not have prohibited the direct transmittal of the documents from the beneficiary to Iraq; and (5) the sole connection of the letter of credit transaction to United States jurisdiction is the transmittal by a bank of documents for whose content the bank has no legal responsibility.

We have requested the opportunity to discuss this matter with you and understand that you will be available to do so on Tuesday, May 14, at 1:30 P.M. I shall attend that meeting together with Dr. Ulrich Trost, General Counsel to SMS's parent corporation, SMS Schloemann-Siemag Aktiengesellschaft.

We very much appreciate your attention to our request.

Sincerely yours,

/s/ Patrick M. Norton
PATRICK M. NORTON

PMN/shh

EXHIBIT D

ALSTON & BIRD

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November 15, 1991

Mr. William Skidmore
Director
Office of Antboycott Compliance
Bureau of Export Administration
Department of Commerce
Washington, DC 20230

Dear Mr. Skidmore:

In a letter dated May 9, 1991 (copy attached), I related to you the efforts of my client SMS Hasenclever, a German corporation, to collect certain payments from the Atlanta office of the Banca Nazionale del Lavoro (BNL) pursuant to two letters of credit issued by that bank, and the contention of BNL that payment was precluded by the antiboycott provisions of the Export Administration Act. On May 14, Ms. Martin and Ms. Gore of your Office very kindly met with the General Counsel of SMS, Dr. Ulrich Trost, and myself to discuss OAC's position on this matter. Recently, I asked Ms. Martin whether OAC would be interested in discussing this matter again in the light of several new developments. Ms. Martin has informed me that she has discussed this matter with you and that you see no purpose to be served by such a meeting.

We respectfully request that you reconsider this decision. We continue to believe that there are serious legal questions as to the applicability of the antiboycott provisions of the Export Administration Act to the transactions

at issue here. At the very least, we believe we are entitled to a fuller explanation of OAC's position in this regard than we have had thus far. The practical effect of OAC's current position, moreover, will be to reward the Government of Iraq at the expense of either SMS or BNL. We seriously doubt that this is in the best interests of the United States and wish to be sure that, before taking a final position in this matter, you have fully considered this eventuality.

My letter of May 9 explains the background to this problem, and I will not repeat it here. I also understand that you will be receiving additional information from counsel to BNL. For present purposes, however, I believe it is useful to summarize the situation briefly as follows:

In June 1990, SMS exported from Germany to Iraq two shipments of machinery and equipment worth more than $20 million. (Other shipments under the same contract have now been paid for and are no longer at issue.) The exports were in accordance with German law in every respect. Pursuant to two letters of credit issued by BNL Atlanta, SMS was entitled to 60% of the value of the shipments against the presentation of shipping documents, and SMS presented those documents to BNL Atlanta in July 1990. From August 2, 1990, payment was prohibited by the freeze of Iraqi assets pursuant to Executive Orders 12722 and 12724. After thorough consideration of the matter, the Department of the Treasury authorized payment to SMS in OFAC License No. IQ-0048.

SMS's shipping documents included "negative origin statements," which SMS was advised by authorities in Hamburg, the port of export, were mandatory for shipments to Iraq. BNL has refused to honor SMS's documents on the grounds that under 15 C.F.R. Sec. 769.2(d) the inclusion in SMS's documents of negative origin statements precludes BNL from forwarding the documents to the Central Bank of Iraq for reimbursement, and that the

inclusion of such statements therefore renders the documents non-conforming. From various correspondence between OAC and ourselves and OAC and BNL, we understand that OAC also believes that transmittal of the documents to Iraq is prohibited by Section 769.2(d), despite the terms of Section 769.2(f)(6), which appear to exempt the implementation of the letters of credit at issue here from all of the prohibitions of the Antiboycott Regulations.

My letter of May 9 explains why we do not believe that OAC's apparent interpretation of the Regulations is consistent with the terms of the Regulations themselves. I will not repeat those arguments but wish to note that, despite repeated inquires, written and oral, we have been unable to obtain an explanation of this apparent inconsistency. I would also like to call your attention to Senate Report No. 95-104, explaining the Senate's intention in enacting the antiboycott provisions of the Export Administration Act Amendments of 1977. At page 41 of that report there is a discussion of the letter of credit provisions of the statute. That discussion states:

> "As is also the case with all other prohibitions of the bill, the transaction in question must be in the interstate or foreign commerce of the United States before the bill applies. Hence, it will be necessary in the first instance to determine whether the transaction to which the credit applies involve the interstate or foreign commerce of the United States. A further threshold question in each case is whether the beneficiary is a U.S. person. *If the beneficiary is not a U.S. person or the transaction in question does not involve U.S. commerce, the bill would not apply.*"

[Emphasis added.] If I read this passage correctly, it was the understanding of the Senate that the *statute itself, in toto,* did not apply if either (1) the underlying transaction was not in U.S. commerce, or (2) the bene-

ficiary was not a U.S. person—conditions both satisfied in this instance.

Legal authority aside, the application of OAC's interpretation of the Regulations to the present transaction leads to practical results that can hardly be compatible with U.S. interests. SMS has now brought suit against BNL in Georgia state courts seeking an order directing BNL to pay SMS against its documents. One of two results is probable: (1) SMS's documents will be deemed non-conforming, and SMS will be denied payment under BNL's letters of credit; or (2) BNL will be directed to pay SMS but will be unable to seek reimbursement from the Central Bank of Iraq. Either a German corporation or an Italian bank will thus incur a major loss, and only *Iraq* will benefit. The Central Bank of Iraq will be relieved of all exposure under its letters of credit with BNL, and the Iraqi Government will have received tens of millions of dollars in equipment for which it will not have to pay. We find it difficult to believe that the Executive Branch would intend or welcome this result. We also seriously doubt that, in enacting the antiboycott provisions of the Export Administration Act, Congress ever intended such an outcome.

We would be interested in discussing these points further with you directly. Please advise me if a meeting for this purpose would be convenient to you at some time in the next few weeks.

Sincerely yours,

/s/ Patrick M. Norton
PATRICK M. NORTON

PMN/shh

EXHIBIT E

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January 14, 1992

Mr. William Skidmore
Director
Office of Antboycott Compliance
Bureau of Export Administration
Department of Commerce
Washington, DC 20230

Re: SMS Hasenclever GmbH ("SMS")

Dear Mr. Skidmore:

In a letter dated May 9, 1991, I wrote to you concerning the applicability of the Department's Antiboycott Regulations to certain demands for payment by SMS under letters of credit confirmed by the Atlanta branch of the Banca Nazionale del Lavoro ("BNL"). On May 14, 1991, Ms. Martin and Ms. Gore from your office met with the general counsel of SMS's parent corporation and myself to discuss OAC's position in this regard. In a further letter to you, dated November 15, 1991, I reiterated SMS's concerns and requested a meeting with you to discuss this matter. Your staff have advised me that you see no purpose to be served by such a meeting. I would, therefore, like to summarize the situation as I understand it.

SMS is a German corporation with no office or other presence in the United States and, accordingly, is not a "United States person" within the meaning of the Anti-

boycott Regulations. The underlying transaction to which the BNL letters of credit apply is not in "United States commerce" within the meaning of the Regulations. OAC has confirmed our view that, as a consequence, the prohibitions of Section 769.2(f) of the Antiboycott Regulations do not apply to SMS's demands for payment from BNL or to BNL's implementation of those demands.

OAC has, however, indicated that it would regard BNL's transmtission to the Iraqi issuing bank of certain SMS documents with "negative origin statements" as violative of the prohibition in Section 769.2(d) of the Regulations. This position was most clearly stated in a letter from Ms. Martin to counsel for BNL dated January 18, 1991. In my letters of May 9 and November 15 and in numerous conversations with your staff, I have explained that OAC's position in this regard appears to be directly inconsistent with the plain terms of Sections 769.1(d)(20), 769.1(f)(1), and 769.2(f)(6) of the Regulations themselves. It also appears to contradict Congress's very explicit intentions in enacting the statutory authority on which the Regulations are based. See, Senate Report No. 95-104, at 41.

I have repeatedly asked OAC, both orally and in writing, to explain how its position can be reconciled with the Regulations and with the legislative history of the statute. Despite these repeated requests, OAC has not even offered an explanation. SMS must, therefore, respectfully conclude that OAC's interpretation of Section 769.2(d) cannot be reconciled with either the terms of the Antiboycott Regulations or with the statutory authority underlying those Regulations.

Very truly yours,

/s/ Patrick M. Norton
PATRICK M. NORTON